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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RAHMON MOMOH,
Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC UTILITIES
COMMISSION,
Defendant and Respondent.

A140088

(San Francisco City & County
Super. Ct. No. CGC-12-519287)

Rahmon Momoh appeals from a judgment of dismissal following the court's entry of summary judgment in favor of respondent California Public Utilities Commission (CPUC). He contends that the trial court erred in finding that his discrimination claims were barred by the statute of limitations and that the continuing violation doctrine did not apply. He also argues that the trial court erred in finding that he had not established a prima facie case of discrimination based on national origin, race, color, or age. We affirm.

I. FACTUAL BACKGROUND

Momoh was born in 1961. He is black and of Nigerian national origin. He began his employment with the CPUC on July 1, 1987 as a Public Utilities Regulatory Analyst (PURA). He was subsequently promoted to PURA-II and PURA-III positions. On June 30, 2008, he was promoted to a PURA-IV position in the Division of Ratepayer Advocates (DRA). Momoh thereafter applied for several PURA-V positions, but was unsuccessful. The successful candidates for those positions scored higher than Momoh. On March 29, 2011, he applied for a PURA-V position in the Safety and Enforcement

Division, Utility Enforcement Branch. On May 23, 2011, at the age of 49, Momoh was promoted to the PURA-V classification, having received the highest score among the candidates for the position. Momoh's complaint alleges that he applied and was qualified for the prior PURA-V positions, but was not promoted due to race, color, national origin, and/or his age.

The PURA-V classification is the highest analyst-level position at the CPUC. A PURA-V employee develops, implements, and directs major studies or programs involving the coordination of several regulatory disciplines with federal, state, or industry-wide policy implications.

As a California state agency, the CPUC operates under the civil service system rules for appointments to PURA-V positions. It does not hire or promote based on seniority. In order to obtain a PURA-V position, a candidate must undergo a merit-based and competitive multi-step process. A candidate must take a civil service eligibility examination to ascertain his knowledge, skills, and abilities to perform at the PURA-V level. The CPUC administers these exams periodically, and schedules them on a first-come, first-served basis. The PURA-V examination consists of a written test, which a panel grades blindly, and an oral examination which is also graded by a panel. With blind grading, the panel does not know the identities of the candidates taking the written portion of the examination.

The CPUC calibrates the scores on the oral and written examinations on a scale developed by the State Personnel Board. The CPUC informs candidates of their scores and the associated rank. A candidate must score within the top three ranks in order to be eligible to apply for a PURA-V position. The examination scores are valid for a set period of time, usually 18 months. If a candidate is not appointed to a position before his eligibility lapses, the candidate must retake the civil service examination.

On May 30, 2008, Momoh took the PURA-V examination and earned a rank of three. The results were valid from May 30, 2008 until November 30, 2009. He took the examination again on March 23, 2010 and scored a rank of three, and was eligible to apply for PURA-V positions between March 23, 2010 and September 23, 2011.

A PURA-V position, however, was posted on March 2, 2010 in the Electricity Policy and Planning Branch of DRA. Momoh learned of the position in late 2009, but was not eligible to apply for it because his eligibility had expired on November 30, 2009. Momoh could have renewed his eligibility for the position by applying to take the examination 30 days prior to the expiration of his eligibility. Momoh was responsible for keeping track of his eligibility expiration. No one prevented him from applying to renew his eligibility.

Momoh talked to Cynthia Walker, his supervisor, about the position and told her he was not eligible to apply for the position. Walker, in turn, spoke with Dave Ashuckian, the deputy director of the DRA, and asked whether they should wait to fill the position until after Momoh was eligible. Ashuckian was concerned that a hiring freeze might be imposed, and declined to wait. Yuliya Shmidt was the successful candidate for the position.

Momoh applied for six additional PURA-V positions, four in 2008 and two in 2010. A candidate with a higher score than Momoh was hired for each of the positions.

Momoh's second amended complaint alleging race, color, national origin, and age discrimination in the CPUC's promotion decisions was filed on August 2, 2012. Momoh also alleged that the CPUC's promotional processes had a disparate impact on applicants over 40 years of age and that the CPUC had a duty to take all reasonable steps to prevent discrimination from occurring under the California Fair Employment and Housing Act (FEHA), Government Code section 12940, subdivision (k).

The CPUC moved for summary judgment on May 3, 2013, arguing that Momoh was not promoted because he did not achieve the highest ranking during the examination process for the PURA-V positions. It also argued that most of Momoh's claims were untimely and barred by the statute of limitations.

The court granted summary judgment finding that four of the claims were time barred because Momoh's claims alleged improper promotions occurring more than a year before Momoh filed his Equal Employment Opportunity Commission (EEOC) charge. The court also found that Momoh could not establish any claims based on the promotion

of Shmidt because he was not eligible to apply for the position when it became available. The court further granted summary adjudication as to Momoh's national origin discrimination cause of action because it was based on a transfer to a different supervisor which did not constitute an adverse employment action, and that in any event the evidence demonstrated that those persons promoted scored higher than Momoh. Finally, the court found that defendant failed to show a triable issue of fact on his disparate impact claims.

II. DISCUSSION

A. Standard of Review

The standard of review of a summary judgment motion in favor of a defendant is well settled. We “independently assess the correctness of the trial court’s ruling by applying the same legal standard as the trial court in determining whether any triable issues of material fact exist, and whether the defendant is entitled to judgment as a matter of law.” (*Rubin v. United Air Lines, Inc.* (2002) 96 Cal.App.4th 364, 372.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the [plaintiff] in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The trial court must view that evidence, and any reasonable inferences from that evidence, “in the light most favorable to” the plaintiff. (*Id.* at p. 843.) We review the trial court’s ruling de novo. (*Id.* at p. 860.)

B. The Shmidt position

Momoh contends that he established a prima facie case that the CPUC discriminated against him by not allowing him to apply for the PURA-V position that was posted on March 2, 2010. We conclude the trial court properly found that Momoh failed to counter CPUC’s evidence that it had legitimate business reasons for its hiring decision.

California follows the United States Supreme Court’s burden-shifting test in trying claims of discrimination based on disparate treatment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Scotch v. Art Institute of California* (2009) 173

Cal.App.4th 986, 1004.) To establish a prima facie case, a plaintiff must show that “(1) he was a member of the protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Guz, supra*, 24 Cal.4th at p. 355.)

If the plaintiff establishes a prima facie case, a presumption of discrimination arises, and the burden shifts to the employer to produce admissible evidence to raise a genuine issue of fact showing that its action was taken for a legitimate, nondiscriminatory reason. (*Guz, supra*, 24 Cal.4th at pp. 355–356.) If the employer meets that burden, the presumption disappears and the plaintiff must then demonstrate that the employer’s proffered reasons are pretexts for discrimination or offer some other evidence of a discriminatory motive. (*Id.* at p. 356.) “The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Ibid.*)

“ ‘A defendant employer’s motion for summary judgment slightly modifies the order of [the burden-shifting test]. If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the [adverse employment action], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. [Citation.] In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing [his] evidence while strictly scrutinizing defendant’s.’ ” (*Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at p. 1005.)

Here, as the trial court implicitly found, there was no adverse employment action with respect to the Shmidt position because Momoh was ineligible to apply for it. (See *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [plaintiff cannot show

employer discriminated against him by not hiring him when he failed to apply for a job].) His eligibility for a PURA-V position expired on November 30, 2009, and the CPUC did not prevent him from renewing his eligibility. Momoh simply did not apply to retake the civil service examination prior to the expiration of his eligibility. It was his responsibility to keep track of his eligibility status. (See *Killingsworth v. Dept. of Health and Human Services* (N.D.Cal. 1985) 602 F.Supp. 640, 644–645 [plaintiff fails to establish a prima facie case where he was ineligible to compete for the position].)

Momoh argues that the CPUC discriminated against him because Walker posted the position, knowing that he would be ineligible to apply for it. The CPUC, however, showed that the position was posted in March 2010 because Ashuckian feared that a hiring freeze was imminent. Momoh asserts that it was Walker and not Ashuckian who made the decision to post the position. Yet Ashuckian testified at his deposition that he told Walker to fill the position and not wait until Momoh became eligible because he was concerned that Governor Brown would impose a hiring freeze. And, Walker testified that it was the policy of the DRA not to wait for a new examination if there were eligible candidates on a list “because otherwise you’re in a position of introducing some kind of subjectivity.” Momoh failed to demonstrate that the CPUC’s reason was a pretext for discrimination. (See *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [employee claiming discrimination must offer substantial evidence that employer’s nondiscriminatory reason for adverse action was pretextual or that employer acted with discriminatory animus].)

C. Statute of limitations

“ ‘Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action based on violations of the FEHA. [Citations.] The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. [Citations.] [¶] As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be

filed with the Department “after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,’ with an exception for delayed discovery not relevant here. (Gov. Code, § 12960, italics added.)’ ” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 (*Morgan*), quoting *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.)

Momoh contends that the continuing violation doctrine extends the statute of limitations on his FEHA claims challenging the four promotions he was denied in 2008. He argues that he did not recognize a pattern of discrimination until 2010 when he filed his EEOC charge.¹ The trial court properly found that these claims were barred by the one-year statute of limitations period under the FEHA. (See Gov. Code, § 12960, subd. (d).)

The “continuing violation” doctrine provides that a limitations period will run anew each time there is another instance of actionable wrongful conduct, as long as there is an “anchor” violation or related act of harassment occurring within the one-year statutory period. (See, e.g., *Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 499.) Under this doctrine, a complaint rising under FEHA is timely if any of the unlawful practices continue into the limitations period. (See, e.g., *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1053; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798 (*Richards*); *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994.)

In *Richards*, the California Supreme Court applied the continuing violation doctrine to an employee’s claim that her employer had not effectively accommodated her disability and that she had been harassed on the basis of her disability. (*Richards*, *supra*, 26 Cal.4th at p. 801.) The *Richards* court held “that an employer’s persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer’s unlawful actions are (1) sufficiently similar in kind—recognizing . . . that similar kinds of unlawful

¹ Momoh filed a charge of discrimination with the EEOC on July 28, 2010.

employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms [citation]; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]” (*Id.* at p. 823.)

The continuing violation doctrine is not helpful to Momoh. The challenged promotions here should have put Momoh on notice that his rights may have been violated. (*Richards, supra*, 26 Cal.4th at p. 815 [recognizing the element of permanence to promotion decisions which should alert an employee that his or her rights have been violated], see also *Maridon v. Comcast Cable Communications Management, LLC* (N.D.Cal. 2013) 2013 U.S.Dist. LEXIS 59490, *36 [promotion decisions were “discrete and permanent when made”].) “Plaintiff’s allegations concern a number of specific job applications where she was considered and rejected for promotion. Though Plaintiff may be able to raise factual issues about the similarity of the hiring process on the various occasions, and her applications and subsequent rejections occurred with relative frequency, each decision was discrete and permanent when made.” (*Ibid.*) Thus, the rejections should have alerted Momoh that he had a duty to assert his rights. (*Id.* at *31 and *36-38.) Momoh’s claims pertaining to the denial of promotions in 2008 are therefore time-barred. (See also *Ortega v. Regents of the Univ. of Cal.* (N.D.Cal. 2012) 2012 U.S.Dist. LEXIS 169938, *13 [discrete acts such as failure to promote are not actionable if time barred even if they are related to acts alleged in timely filed charges].)

D. Subjective scoring

Momoh also contends that the CPUC discriminated against him in denying him two promotions in 2010. In May 2010, the successful candidate for the PURA-V position was Junaid Rahman. In September 2010, Monisha Gangopadhyay was the successful candidate.

The CPUC’s position was that both Rahman and Gangopadhyay were offered the positions because they scored higher than Momoh on the review of their Statement of Qualifications (SOQ’s). Once a candidate for a PURA-V qualifies to apply for a position based on his or her scoring in the top three ranks of the civil service exam, he or

she must submit SOQ's "describing their knowledge, skills, abilities, and experience as they relate to the required qualifications listed in the Job Opportunity Bulletin" listing the specific job opening. A panel of two or three raters reviews the SOQ's based on standardized rating criteria, providing written comments and scoring each candidate based on the merits of the candidate's qualifications. The CPUC offers the position to the candidate with the highest score subject to an internal review for "completeness and procedural correctness."

Momoh asserts that he was more qualified than Rahman and Gangopadhyay by comparing the respective SOQ's. He argues that his qualifications are objectively superior to those of the selected candidates and that the CPUC relied on subjective scoring to justify its employment decisions.

Morgan, supra, 88 Cal.App.4th at page 75 is instructive on this issue. While Momoh attempts to show why he is better qualified than the candidates selected, "[a]n employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise,'" but must demonstrate that a reasonable factfinder would rationally find those proffered reasons " 'unworthy of credence . . . ' " (*Ibid.*)

Here, each candidate for the PURA-V position was required to submit his or her SOQ's describing their knowledge, skills, abilities, and experience for the position and they were rated by two or three raters who provided written comments assessing the merits of the candidate's qualifications as they related to those required for the position. As explained in *Morgan*, "[t]he fact that appellant's qualifications were measured qualitatively or subjectively by each of the decision makers does not defeat a summary judgment motion. The process by which individuals' qualifications and work performance are measured against job requirements is often at least partially a subjective one on the part of the evaluator." (*Morgan, supra*, 88 Cal.App.4th at pp. 75–76.) A plaintiff must do more than deny the credibility of the employer's witnesses, he or she must produce substantial evidence of pretext. (*Id.* at p. 76; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

The record contains the evaluations of the raters for the two positions in question. Our review of them reflects that the CPUC had legitimate reasons for not hiring Momoh, and that its decisions were not a pretext for discrimination. Not only did the candidates who were promoted receive higher ratings, with respect to the position awarded to Gangopadhyay, one of the reviewers found that her SOQ's demonstrated strong experience in five of the areas listed in the job posting, while the same reviewer found that Momoh had strong experience in only four of the areas listed. The other reviewer for that position found that Gangopadhyay provided greater detail in her SOQ's of her analysis of data while Momoh did not provide detailed information on how he developed calculations. This rater was also impressed by Gangopadhyay's collaborative experience, but noted that Momoh had not provided much information on his work in a team environment. Complex economic, financial, and policy analysis and demonstrated ability to maintain cooperative and positive working relationships with others were required qualifications listed in the job posting that were to be addressed by the candidates in their SOQ's. Hence, the CPUC's higher rating for Gangopadhyay appears reasonable.

The determining factor with respect to the Rahman position appears to have been one rater's assessment of the candidates' ability to maintain cooperative and positive working relationships with others. Both raters gave Rahman higher scores in this area which again was one of the required qualifications for the position.

While Momoh faults the raters for inconsistent evaluation of the candidates' qualifications, "[a]n employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact." (*Horn v. Cushman & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 816.) Hence, Momoh's self-assessment of his qualifications does not undermine the legitimacy of the CPUC's reasons for not offering him these positions. (*Morgan, supra*, 88 Cal.App.4th at p. 79.)

E. National origin claim

In his complaint, Momoh alleged that he was not selected for a PURA-V position because of his Nigerian national origin. In his deposition, Momoh testified that one example of his claim was that he was transferred to a different supervisor. The trial court

found that the transfer did not constitute an adverse employment action² and further found that he was not discriminated against on the basis of national origin because the persons promoted scored higher than Momoh.

Momoh contends that the transfer was not the basis for his claim of national origin discrimination, but rather that his claim was based on his allegations that he was denied the promotions to PURA-V positions. We agree that Momoh's complaint alleges national origin discrimination on that basis. But as we have previously concluded, the evidence demonstrates that the CPUC had legitimate reasons for promoting the other candidates over Momoh based on their respective qualifications. Accordingly, we uphold the court's ruling granting summary adjudication on the national origin discrimination cause of action on the ground that Momoh presented no competent evidence to support his assertion that he was denied promotions based on national origin discrimination.

F. Statistical analysis

In opposition to the CPUC's motion for summary judgment, Momoh submitted the report of James L. Plummer, an economic expert witness, who prepared a statistical analysis of whether there was age discrimination in the CPUC's hiring processes for PURA-IV, PURA-V, and PPS job categories. The report was prepared for the CPUC in another case, *Enderby v. California Public Utilities Commission* (Super. Ct. S.F. City and County, 2010, No. CGC-07-464877). Momoh argues that the report demonstrates a disparate impact on applicants over the age of 40.

The Plummer report, however, does not address the actual applicant pool involved in the employment decisions at issue in this case nor does it identify a specific employment practice.

"Plaintiffs generally cannot attack an overall decisionmaking process in the disparate impact context, but must instead identify the particular element or practice

² A transfer into a comparable position that does not result in substantial and tangible harm is not an adverse employment action. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 393.) Momoh does not contend that the transfer was an adverse employment action.

within the process that causes an adverse impact.” (*Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1124; *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640, 650 [plaintiff must show the specific employment practice and its effect on the actual pool of applicants]). Here, as the trial court found, the Plummer report did not analyze the actual pool of applicants at issue in this case, and “[it] fails to create a triable issue of material fact because [Plummer] did not distinguish between the first step of Defendant’s hiring process (the eligibility exam) and the second step of the process (the statement of qualifications analysis).”³ The Plummer report addresses only the pool of people that took the eligibility examination for the PURA-V position. It thus does not necessarily include those applicants who ultimately proceeded to the SOQ’s step of the selection process, the step of the selection process that Momoh claims was discriminatory. The Plummer report, hence, is of no assistance to Momoh here. In short, Momoh failed to show that a specific practice caused a disparate impact.

III. CONCLUSION

The judgment is affirmed.⁴

³ Momoh acknowledged below that the jury in the *Enderby* case, which had the Plummer report before it, found no disproportionate adverse age impact in the PURA-V job classification.

⁴ We grant the CPUC’s motion to strike Exhibits 1 and 2 from Momoh’s reply brief, but deny the request for sanctions.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.